EME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

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J. C. FAIRLEY, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

LEVI MARSAW, III, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

RESPONSE TO THE MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1058

J. C. FAIRLEY, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

LEVI MARSAW, III, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

RESPONSE TO THE MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Introductory Statement

The Solicitor General, at the invitation of the Court, filed on May 16, 1968, a Memorandum for the United

States as Amicus Curiae in the above styled cases; and, because the Clerk felt it only fair that counsel should be afforded an opportunity to file a response to this Memorandum, the Appellees respectfully respond; but, in making this response it is earnestly urged, in the event the Court does not summarily dismiss the appeals or summarily affirm the Judgments of the District Court as moved for in Appellees' Motion to Dismiss or Affirm, but entertains the questions in these cases upon their merits, that ample opportunity be afforded the Appellees to appear before the Court and orally argue these causes after having had opportunity to thoroughly brief the issues on the merits.

Jurisdictional Problem

We do not differ from the conclusion reached by the United States as to the threshold question of whether three-judge courts were properly convened so that direct appeals lie to this Court, but do not necessarily agree with the argument urged by the United States to reach this conclusion. The United States took note that "until the matter was noticed here in the order requesting the views of the Solicitor General in Nos. 1058 and 1059, no one appears to have doubted the appropriateness of convening a court of three judges." (Memorandum for the United States, page 5). This jurisdictional question has constantly confronted the Appellees and was raised in the Trial Court by Appellees' Motions to Dismiss, but though raised was not pressed for reasons sufficient unto themselves, the elapsed time period in securing a final decision by this Court being not the least thereof. Moreover, the Appellees were and are cognizant of the jurisdiction of this Court to determine certain issues and to make such corrective Orders as may be appropriate even in the event that the matter

was not one to be heard by a three-judge court. *Bailey* v. *Patterson*, 369 U.S. 31, 34. Thus, since the Plaintiffs had established the battle ground, and the District Judge to whom the matter was assigned had certified the necessity for the convening of such a Court, and the Chief Judge of the Circuit had unquestionably accepted the certification and appointed the additional Judges, the Defendants were of the opinion that in opposing the convening of a three-judge court no useful purpose would be served.

We agree with the United States that authority, if it exists, for convening the three-judge courts in these actions must be conferred by Section 5 of the Voting Rights Act of 1965. The question of the convening of three-judge courts in these actions outside the authority conferred, if such authority is conferred, by the Voting Rights Act is foreclosed by this Court's decision in *Swift and Company* v. *Wickham*, 382 U.S. 111.

We admit that to reach the stated conclusion the Court must place a somewhat strained interpretation on the phrase, "[A]ny action under this section." A literal reading of this phrase would tend to suggest an interpretation that the referred to "[A]ny action" is directed only to suits expressly authorized by the section. Weight is added to such an interpretation rather than against it by the statement in the Memorandum for the United States at Page 22 that "the Attorney General's failure to act *under Section 12* of the Act in cases. . . ." (Emphasis Added) The import of this statement is that the United States is admitting that any action taken by the Attorney General to enforce the proscription in Section 5 of the Act would be *under Section 12* of the Act and not under *Section 5*.

Further, the Memorandum for the United States adds confusion to this jurisdictional problem rather than clarity

when at Page 15 of said Memorandum the United States says:

> "[R]ather than attempting to spell out which kinds of procedures and practices were intended to be covered, Congress spoke in general terms, leaving it to the District of Columbia court or the Attorney General to make the determination as to which side of the line a particular procedure or practice fell."

Even in light of the above quoted statement which asserts that the decision as to which kinds of procedures and practices are covered by the Act rests entirely and exclusively with and in the District of Columbia Court or the Attorney General, the United States also asserts that said decision rests with and in the three-judge courts convened in these cases. This again is an inconsistency in the argument of the United States addressed to the jurisdictional problem.

We also submit to the Court that the consideration suggested by the United States in its Memorandum at Page 10 that the convening of a three-judge court is more appropriate "when the claim being made by a private party is that a state statute of general applicability should be enjoined because the state has not followed the procedures prescribed by federal law. . . ." is not consistent with the rationale of *Swift and Company* v. *Wickham*, supra.

Suggestion of Mootness

Section 5 of the Voting Rights Act of 1965 provides: "[T]hat such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, or procedure has been submitted by the Chief Legal Officer or other appropriate official of such state, or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . ."

It will be noted that while neither the State of Mississippi, Forrest County nor Adams County has submitted to the Attorney General of the United States Section 2870, Mississippi Code, as Amended in the 1966 Legislative Regular Session, and/or the actions taken under said Section by Adams and Forrest Counties, such submission has been made by the Order of this Court of March 11, 1968, inviting the position of the United States as to this matter. To this date, being more than sixty days from said submission, the Attorney General has not interposed any objection to said Section and/or said actions thereunder. Even though the United States accepted the invitation to file a Memorandum, which Memorandum was filed more than sixty days after this Court's Order of March 11, 1968, it still did not interpose an objection. In that particular, the situation in these cases is in nowise different from the situation which existed wherein the altered Voting Laws of South Carolina were approved by the Attorney General although never submitted by the State of South Carolina for jurisdictional review in the District Court for the District of Columbia nor to the Attorney General for his scrutiny. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 320.

The United States in its Memorandum at Page 15 states that:

> "[S]ince Section 5's approval procedure was designed to serve an informing function—to provide 'a method of bringing to the attention of the Government changes in state law' (Assistant Attorney General Marshall's House Hearings, Page 72), . . ."

The import of this interpretation of Section 5's approval procedure, placed upon it by the United States, is that when the Attorney General is "informed" of a change in state voting laws that the method by which he is "informed" is of no consequence and the sixty day period in which

he may object to the change as provided for in said Section commences to run upon his being so "informed." We suggest to the Court that the Attorney General received the information regarding said Section 2870 of the Mississippi Code and the actions taken under said Section by Adams and Forrest Counties in the same and like manner, i.e., a proceeding in this Court, as he received the information regarding the change or changes in the Voting Laws of South Carolina which he affirmatively approved in *South Carolina* v. *Katzenbach*, supra. We suggest that his failure to object in these cases is tantamount to his affirmative action in *South Carolina* v. *Katzenbach*. Therefore, Appellees and this Court must "assume[d] from past silence [is] that the Attorney General was not prepared to interpose an objection to the changes being effected, and thus declined to seek to compel a State or political subdivision to comply with what would have in all likelihood been a wholly formalistic step that would merely have delayed final implementation of a constitutionally required restructing of government." (Memorandum for United States, Page 22)

We reiterate that the Attorney General has not to this date interposed an objection even though he was afforded an opportunity by this Court to so do.

Nowhere in the Memorandum of the United States is an objection registered to Section 2870, Mississippi Code and/or the actions taken thereunder. In fact, the United States affirmatively asserts that:

> "[O]ur (The United States') submission (of this memorandum), of course, does not reach the ultimate issue of the validity of the challenged State laws; . . ." (Memorandum for the United States, Page 11).

We hasten to acknowledge that the United States continues by asserting that the question of validity would have to

be "resolved by the District Court for the District of Columbia if the Attorney General, upon investigation, *shall determine to interpose objection.*" (Memorandum for the United States, Page 11) (Emphasis added) But we suggest that any objections, if such should materialize, must be interposed as the basis for an independent suit by the United States to enjoin the operation and enforcement of Section 2870 of the Mississippi Code and/or actions taken under and by virtue of said section (see *United States* v. *Mississippi,* 380 U.S. 128) since the sixty day period which in the Attorney General (United States) could have interposed an objection under and by virtue of Section 5 of the Act has elapsed. We submit that the apparent attempt by the Attorney General (United States) to extend its right (conferred by Section 5) to interpose objections beyond the sixty day period provided for in the said section must fail when viewed in light of the obvious purpose and reason for inserting this period of limitation upon the exercise of said right. Obviously, Congress was of the mind that this "uncommon exercise of congressional power"; except under exceptional circumstances "not appropriate" legislation; which reposes in the Attorney General of the United States veto power over certain legislative acts of sovereign states must be exercised, if exercised at all, with diligence and dispatch. Congress by inserting the sixty day period of limitation admonished the Attorney General that not only could he not sleep on this "uncommon" right but that he could not even "doze" thereon. This obvious purpose and reason for the limitation comports with congressional concern for the exercise by Congress of its authority in this permissible but "decisive" manner.

This suggestion of mootness is advanced only on the assumption, arguendo, that Section 2870, Mississippi Code, and the actions taken thereunder by Adams and Forrest Counties come within the purview of the Voting Rights Act of 1965, which assumption is emphatically denied.

Private Suits Are Not Authorized to Enforce Section 5 of the Voting Rights Act of 1965

The United States in Footnote 7 of its Memorandum raises and at the same time attempts to resolve the question whether these Appellants had the right to institute these actions to enforce the proscription contained in Section 5 of the Act. We agree with the United States that the question is present, but disagree that it is resolved in favor of the right of Appellants to bring these actions but submit that it is resolved against such right. This is a jurisdictional question which was raised and urged by Appellees in the trial court by their Motions to Dismiss for Lack of Jurisdiction but because of the disposition by that Court in *Bunton, et al.* v. *Joe T. Patterson, et al.*, No. 1059, which disposition was made immediately prior to the argument in *Fairley* v. *Patterson*, No. 1058 (these cases) said question was not pressed. Further, said jurisdictional question, though not argued in Appellees' Motion to Dismiss or Affirm filed in this Court, was presented by Appellees moving this Court to dismiss the appeal. If Appellees had based their Motion solely on the ground that no substantial question on the merits had been raised or presented the Motion would have been only a motion for summary affirmance but since Appellees were aware of the jurisdictional questions involved in these cases, they moved the Court for a *dismissal* or in the *alternative* a *summary affirmance of the Judgments.*

We suggest to the Court that the question of whether these Appellants have a right to bring these actions as private citizens is a more serious jurisdictional question than the jurisdictional question posed by the convening of the three-judge courts. As readily admitted by the United States, since it could do no less, the "Voting Rights Act itself does not expressly provide for private

suits to enforce Section 5 . . ." (Memorandum for The United States, Footnote 7.) The United States then attempts to resolve this question of jurisdiction by merely stating that it "would *seem* to be conferred on the District Courts by 28 U.S.C. 1343 (4)." (Emphasis added) (Footnote 7) This indecisive statement, lacking all legal support, does not square with the position previously taken by the United States in its Memorandum that these actions were brought under and by virtue of Section 5 of the Act. It appears that the United States is attempting to have its cake and eat it too. We submit that the United States has decided in advance where it wants to go and in its Memorandum is making a futile attempt to get there.

As we read the Voting Rights Act of 1965, and particularly Section 5, thereof, it confers no rights upon any private citizens, but is merely a remedial statute by which the right to vote guaranteed by the Fifteenth Amendment to the Constitution of the United States will be vindicated.

The United States contends that Section 5 of the Act "explicitly confers upon individual citizens a *right* . . ." (Emphasis added) (Memorandum for the United States, Footnote 7) This contention finds no support in *South Carolina* v. *Katzenbach*, 383 U.S. 301, but is, in fact, refuted by the Opinion therein. This Court said at page 308 that: "[T]he Act creates stringent new remedies . . ." and addressing itself specifically to Section 5 remarked that "Section 5 prescribes a second *remedy* . . .' (Emphasis added) (383 U.S. at page 316)

Further, while focusing on Section 5 of the Act, the section which the United States points to as conferring a *right*, this Court opined that "[A]n appropriate *remedy* is a judicial determination that continued suspension of the new rule is unnecessary to *vindicate rights guaranteed by*

the Fifteenth Amendment." (Emphasis added) (383 U.S. 335)

Dispositive of the question whether this Act creates certain new voting *rights* or only secures and protects existing voting rights guaranteed by the Fifteenth Amendment to the Constitution of the United States is the language of this Court that:

> "South Carolina contends that the cases cited above are precedents only for the authority of the judiciary to strike down state statutes and procedures—that to allow an exercise of this authority by Congress would be to rob the Courts of their rightful constitutional role. On the contrary, § 2 of the Fifteenth Amendment expressly declares that 'Congress shall have power to enforce this article by appropriate legislation.' By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for *implementing the rights created in § 1.* 'It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the [Civil War] amendments fully effective.' Ex parte Virginia, 100 U.S. 339, 345, 25 L. Ed. 676, 679. Accordingly, in addition to the courts, Congress has full *remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.*" (Emphasis added except "enforce") *South Carolina* v. *Katzenbach,* 383 U.S. 301, 325, 326.

A reading of the Act reveals that the enforcement, thereof, is exclusively in the Attorney General of the United States. This is confirmed by this Court's comment that:

> "[A]fter enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, *with authority in the Attorney General to employ them effectively.*" (Emphasis added) *South Carolina* v. *Katzenbach,* 383 U.S. 301, 337.

It is inconceivable that the Congress of the United States intended to place in the hands of any and all private citizens authority to enforce Section 5 of the Voting Rights Act. As announced by this Court in discussing said Section 5 of the Act in *South Carolina* v. *Katzenbach*, supra, 334:

> "[T]his may have been an uncommon exercise of congressional power, as South Carolina contends, but the court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."

Appellees fail to comprehend how it could be seriously contended that the enforcement of such an "uncommon exercise of congressional power" and "extraordinary power to veto" in the Attorney General would be exposed to the whim of any disgruntled private citizen.

Further, this Court continuing to allude to Section 5 of the Act, stated at page 335 that:

> "[A] state or political subdivision wishing to make use of a recent amendment to its voting laws therefore, has a concrete and immediate 'controversy' *with the federal government.*" (Emphasis added)

This Court did not hold, at any place in its Opinion that authority was in private citizens to "employ" the "array of potent weapons" contained in the Act or that the enforcement of any voting laws created a "controversy" between a State or political subdivision thereof and a private citizen or citizens.

Assuming, arguendo, that the statute and actions taken by the Appellee counties thereunder, presently before this Court, come within the purview of the Voting Rights Act of 1965, these actions could have been mooted at any time by the State of Mississippi, or Adams County,

or Forrest County, submitting said statute and actions thereunder to the Attorney General of the United States and he approving same. The Appellants in these actions would have had no standing in any Court to object to the action of either the Appellees, the State of Mississippi, or the Attorney General. It is difficult to conceive of a right of action which can so readily be extinguished without the approval of the party or parties in which the right allegedly exists.

It is apparent throughout the Act and as stated by the United States in its Memorandum that the only purpose for this proviso in Section 5 of the Act is to inform the Attorney General of any new voting laws to be enforced in a State covered by the Act. It was never intended as a proviso to inform private citizens of such actions taken by a State and never intended to vest any right or authority in any private citizen. The only remedy conferred upon a private citizen by the Act is found in Section 5 thereof which, as the United States points out in its Memorandum at page 8, is to not be "denied the right to vote for failure to *comply* with such" new voting laws. (Emphasis added) This position comports with the position Appellees took in their Motion to Dismiss or Affirm filed in this Court.

We suggest to the Court that Congress intended, as this Court has stated, to "marshal an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively." We submit that Congress, realizing that the enactment of Section 5 of the Act was an "uncommon exercise of congressional power", was insistent that any confrontation with a sovereign state or political subdivision thereof be with the United States only. For the good order of the Republic, Congress could have done no less. It is almost ludicrous to even suggest that the Congress of the United States would demean a great

and sovereign state to a position whereby a private citizen could veto a statute enacted by such state and enjoin the operation of same without the necessity of first alleging and proving that the statute is unconstitutional.

This Court, in discussing said Section 5 in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335, declared that "[T]he Act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension . . ." We suggest that this is a clear indication by this Court that such enforcing mechanisms are confined within the four corners of the Act. A search within these confines fails to discover any authority, express or implied, for a private citizen to institute an action to enforce the proscription contained in Section 5 of the Act.

Reply to the Discussion of the United States of Section 5 of the Act

The United States, at page 12 of its Memorandum, confesses that the instant actions do not involve statutory changes which, in so many words, alter the existing rules governing the casting of individual ballots. But the United States contends that Section 2870 of the Mississippi Code and the actions taken thereunder by Adams and Forrest Counties come within the ambit of Section 5 because they substantially change the constituency of the members of the Boards of Supervisors of said counties. We suggest to the Court that the Voting Rights Act of 1965 was never intended by Congress to deal with a change in the constituency of any elected official. Such is covered and controlled by the Fourteenth Amendment to the Constitution of the United States and not the Fifteenth Amendment which Amendment was the basis for the enactment of the said Voting Rights Act. As was stated in Appellees' Motion to Dismiss or Affirm, if this position, now advanced by the United States, is approved by this Court, such would

seriously impede, if not prevent, the implementation of the "one man, one vote" rule announced by this Court in *Reynolds* v. *Sims*, 377 U.S. 533, and amplified in *Avery* v. *Midland County, Texas*, 88 S. Ct. 1114, 36 L.W. 4257. This tragic result is forewarned by the statement of the United States in its Memorandum at page 21 that, "[P]erhaps there has been a general unawareness of the potential relevance of Section 5 to apportionment matters."

In any and all changes in apportionment and districting arrangements, there is inherently a change in the constituency of certain elected officials and in most cases, there is a substantial change. In fact and in truth, the purpose of reapportioning and redistricting is to bring about a change in the constituency of elected officials and such is the command of this Court's decisions in *Reynolds* v. *Sims*, supra and *Avery* v. *Midland County, Texas*, supra.

For years, Mississippi and several other Southern States have been accused, falsely, but nevertheless still accused, of "foot dragging" in the field of individual rights and of employing "obstructionist tactics" in the Courts of Law of these United States. *South Carolina* v. *Katzenbach*, supra. Many times, these accusations have flowed from the fountainhead of the United States. Now, for the first time, the United States has accused the State of Mississippi and two political subdivisions thereof, of moving too fast in the field of individual rights. From a reading of Footnote 18, page 26 of the Memorandum for the United States, Appellees gleam that Mississippi and the Counties of Adams and Forrest are being verbally chastised by the United States or by the writer of the Memorandum for anticipating what this Court enunciated in *Avery* v. *Midland County, Texas*, supra. Since the United States has attempted in said footnote to debase the noble purpose of the Legislature of Mississippi in enacting Section 2870 of the Mississippi Code, and the Counties of Adams and Forrest in taking actions

thereunder we feel constrained to point out to the Court several matters which the Court can judicially notice. *On April 11, 1966,* United States District Judge Harold Cox, in *T. L. Crosby, et al.,* v. *Pearl River County Board of Supervisors, et al.,* C.A. No. 3165, enjoined Pearl River County, Mississippi to redistrict said County within ninety days. Being aware of the Order of that Court which, reflected that the United States District Court for the Southern District of Mississippi was of the opinion that the command of *Reynolds* v. *Sims,* 377 U.S. 533, encompassed County level governmental bodies, the Legislature of the State of Mississippi enacted Section 2870 of the Mississippi Code effective *May 27, 1966.* Said Section provided for the redistricting of a county on a population basis or, in the alternative, to elect the supervisors of said districts at large with residential restrictions as approved by the rationale of *Fortson* v. *Dorsey,* 379 U.S. 433. This alternative method was specifically approved as satisfying the requirements of the constitution by this Court in *Dusch* v. *Davis,* 387 U.S. 112.

On *July 27, 1966,* a Three-Judge Court in the Southern District of Mississippi held that the "one person, one vote" rule applies to apportionment of county supervisors' districts in Mississippi. *Martinolich* v. *Dean,* 256 F. Supp. 612.

Although it is the only purpose of this Court to consider the legal question raised in these actions, the Solicitor General of the United States, in his Memorandum, predicates his argument on factual suppositions which, by virtue of the stipulations filed in this cause, have no place. And although these appellees regard allegations of fact and suppositions of fact as being violative of the most basic procedure of appellate practice, nevertheless, appellees are constrained to refer the Court to several factual matters which they submit this Court may judicially notice.

Most indicative of the intent and purpose of the two governing bodies is found in the resolution of Adams County adopted under and by virtue of Section 2870 of the Mississippi Code, a copy of which resolution is attached for the Court as appendix to this Response. It is elementary in local government that a governing body can speak only through its minutes and the resolutions and orders spread therein and that the same are a matter of public record. Specific reference is here made to the following quoted provision of said resolution:

> "WHEREAS, due to the geographical location of the said City of Natchez, it is extremely difficult and highly impractical to divide the county into five supervisors' districts with due regard to equality of population and convenience of situation for election of the members of the Board of Supervisors; and
>
> "WHEREAS, the Board of Supervisors is aware of the 'one man, one vote' decisions of the courts and is desirous of taking action to the end that the vote of each qualified elector shall have the same weight and effect in the election of all members of the Board of Supervisors."

In support of the action of Adams County Board of Supervisors, appellees refer this Court to the following population figures taken from the United States Department of Commerce, Bureau of the Census, Population 1960 of Mississippi, General Population Characteristics, an official government document and entitled to be judicially noticed by this Court:

Supervisor's District	Population
1	14,092
2	1,313
3	1,458
4	15,840
5	5,027

The Board of Supervisors of Adams County, authorized by the Legislature of Mississippi to correct the inequality of the voting strength of citizens from the various districts, resolved so as to entitle each citizen to cast an equally weighted vote. The intent and purpose of the Resolution and Order adopted *October 19, 1966,* cannot be impugned by mere supposition.

As to Forrest County, the same publication sets forth the following population figures by supervisors' districts.

Supervisor's District	Population
1	23,349
2	7,384
3	18,147
4	1,812
5	2,030

Mississippi and two of her political subdivisions cannot be rightfully accused of being in the posture of anticipating decisions of this Court and then reacting thereto in a manner to defeat or at least to impede the will of this Court. In fact, the actions taken by the Appellees attest to an opposite stance. Appellees, once made aware of their constitutional duties, responsibilities and obligations in the area of apportionment and districting moved with admirable speed to conform with the dictates of this Court and those of the District Court for the Southern District of Mississippi. Appellees, in duty bound, responded to the trumpets of these courts and did not wait for the crack of the whip. The actions taken by the Appellees are deserving of admiration not admonishment; of commendation not condemnation; of extolment not reprobation. It would have served the purpose of these United States far better if the United States had heralded the actions of these Appellees and heaped upon them the deserving praise for voluntarily recognizing their obligation to the

people and voluntarily carrying out the command of that obligation rather than heap criticism upon them.

Appellees will make no effort in this response to discuss the legislative history which appears in the Memorandum submitted by the United States other than to state that it is our position that the legislative history as fully developed in Appellees' Motion to Dismiss or Affirm supports the contention of Appellees and the holding of the District Court that Section 2870 of the Mississippi Code and the actions taken thereunder by Adams and Forrest Counties do not come within the purview of Section 5 of the Voting Rights Act of 1965.

Appellees invite the Court's attention to the fact that the United States admits and confesses in its Memorandum that the use of the term "comply with" by Congress in Section 5 of the Act restricts the scope of Section 5 if the said "comply with" is given its literal and true meaning. But the United States hastens to state that the term "comply with" is somewhat "inapt." We point out to the Court that the term "comply with" is also used in Section 4(a) of the Act. The Voting Rights Act of 1965 was prepared and written under the auspices of the Attorney General of the United States and was thoroughly discussed in both the Senate and House Hearings. Further, it is common knowledge that said Act and every word contained therein was scrutinized by both the proponents and opponents of said Act. And in its final form each and every word therein reached the dignity of "words of art." For the Office of the Attorney General to at this late date characterize the use of the term "comply with" as being "inapt" is a transparent attempt on its part to include in Section 5 of the Act matters never intended by the Congress of the United States to be covered thereby and in so doing increase the power of the Attorney General.

We also invite the Court's attention to the statement appearing in the Memorandum for the United States at pages 20 and 21 thereof that:

> "[I]n the first instance, it is hazardous to attempt to accord controlling significance to a single comment by *one individual* regarding the intended scope of a statutory provision, . . ." (Emphasis added)

This "one individual" who is referred to by the United States was none other than Assistant Attorney General Burke Marshall, in all likelihood the main architect of the Act. Again the United States attempts to "confess error" in order to gain in the long haul. The United States appears to be taking the position that "two wrongs make more rights."

We are at a loss to understand the position taken by the United States in its Memorandum that the method of electing members of a legislative body at large with certain residential restrictions may still be open to a constitutional attack on its face. This Court held in *Dusch* v. *Davis*, 387 U.S. 112, that such a method met with all the requirements of the Constitution of the United States. This holding was reaffirmed in *Avery* v. *Midland County, Texas*, 88 S. Ct. 1114, 36 L.W. 4257. In *Avery*, this Court stated that:

> "[T]he Sailors and Dusch cases demonstrate that the constitution and this Court are not roadblocks in the path of intervention, experience and development among units of local government."

This Court had already stated:

> "that in Dusch v. Davis, 387 U.S. 112 (1967), the court permitted Virginia Beach to choose its legislative body by a scheme that included at large voting for candidates some of whom had to be residents of particular districts, even though the residence districts varied widely in population."

We acknowledge, as we did in our Motion to Dismiss or Affirm filed in this Court, that these Appellants, irrespective of what this Court holds in these actions would in nowise be precluded "from filing an action in the United States District Court for the Southern District of Mississippi and asserting therein, invidious discrimination." (page 23, Appellees' Motion to Dismiss or Affirm)

We cannot agree with the position of the United States that "a holding [by this Court] that Section 5 is applicable in these circumstances would not be tantamount to concluding that the prescribed approval procedure relates to all changes in the affected states relating to apportionment and districting of governmental bodies." (Memorandum for United States, page 24) We suggest that such a holding would be tantamount to such a conclusion and submit that this is consistent with that portion of the Memorandum for the United States wherein at page 13 it is stated that laws which substantially change the constituency of certain elected officials affect the electoral process and thereby is within the purview of Section 5 of the Act. Again, we say that any and all changes relating to apportionment and districting of governmental bodies has to bring about a change in the constituency of elected officials being the sole purpose of making such change.

The United States at page 14 of its Memorandum advances the proposition that: "the language of Section 5 and this Court's reference to that provision in its Opinion in *South Carolina* v. *Katzenbach* strongly supports the view that the section should not be read grudgingly." We suggest that the language of Section 5 and this Court's Opinion in reference thereto clearly indicates to the contrary. As heretofore pointed out in this response this Court emphasized that the enactment of Section 5 was "an uncommon exercise of congressional power" and absent the ex-

ceptional conditions found by Congress to exist would have been an inappropriate legislative measure. Such findings by this Court dictate, in fact demand, that said Section 5 be read grudgingly. Bearing in mind the tremendous impact that a holding by this Court that Section 2870 Mississippi Code and the actions taken thereunder come within the purview of the Act will have on the implementation of this Court's rule of one-man, one-vote and having been put on notice by the United States that "there has been a general unawareness of the potential relevance of Section 5 to apportionment matters" this Court is compelled to dismiss the appeals or summarily affirm the judgments for to do less will be to break faith with the millions of people this Court so recently emancipated from the bound of malapportioned legislative bodies.

It would be a cruel congressional hoax if an act of Congress passed for the noble purpose of obliterating once and for all the last remaining vestige of slavery in the field of voting would halt the freeing of millions of other Americans from a different type of slavery in the same field. These troubled times cry out for an interpretation, by this Court, of Section 5 which will synthesize with the one-man, one-vote principle announced by the Court in *Reynolds* v. *Sims*, 377 U.S. 533.

The United States attempts to allay all fears that a holding by this Court that Section 5 is a "broad prophylactic measure" will amount to placing a roadblock in the path of changes in apportionment and districting arrangements by asserting that most of such changes "have been accomplished under the aegis and supervision of federal courts, and not by the States alone." (Memorandum for the

United States, page 22) This reassuring statement by the United States loses its quieting and calming effect when one realizes that the changes now before this Court were not accomplished under "supervision of federal courts" but "by the state[s] alone." Such changes may qualify as "under the aegis of federal courts" if this phrase includes the commands of this Court.

We suggest to the Court that this is a fallacious argument and does not square with the language of the Act or with the earlier position taken by the United States. If any provision of the Act is without doubt it is that provision which requires that any new changes of voting laws enacted by a state or political subidivision thereof, objected to by the Attorney General of the United States, must gain approval of the District Court for the District of Columbia before they may be enforced. This, simply stated, means that if this Court holds, as urged by the United States, that Section 2870 of the Mississippi Code and the actions taken thereunder by the Counties of Adams and Forrest come within the purview of the Voting Rights Act of 1965, then Congress has withdrawn from local courts the authority to pass upon new changes in the apportionment and districting arrangements in States covered by the Voting Rights Act of 1965.

The authority to approve new changes in voting laws enacted in States covered by the Act rests exclusively in the District of Columbia and no other court has such authority no matter how the new laws may have come before that court.

It does not take much imagination to conceive of a situation wherein a recalcitrant malapportioned legislative body could refuse to change its apportionment arrange-

ment and jurisdiction to entertain a suit to force such change would be in the District Court of the District of Columbia. But under and by virtue of the Act only the offending state has the right to institute such action. We are left with an intolerable situation whereby an offending state or political subdivision thereof can refuse to institute suit to gain approval of a change in its apportionment or districting arrangement therefore the state or political subdivision cannot enforce a new change which is exactly the very posture they want to remain in.

It is a touch of irony that the position of Appellees before this Court can be summarized with the language found in the Memorandum for the United States at page 23 thereof. "All such changes were directed toward achieving fairer representation for all citizens and insuring that all voters, however situated, cast an equally weighted vote. It is thus rather unlikely that any such changes would have a potentially detrimental effect on the right of newly enfranchised Negroes to vote in the affected States; rather, they would in all probability serve to assist in the effectuation of Fifteenth Amendment rights."

Conclusion

We submit to the Court that the Memorandum for the United States does not disturb the position taken by these Appellees in their Motion to Dismiss or Affirm, but in certain instances adds support to that position. Therefore, the Motion of Appellees to Dismiss the Appeals should be

sustained, or alternatively, the Judgments of the District Court be affirmed.

Respectfully submitted,

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APPENDIX

WHEREAS, the City of Natchez (being the only municipality in Adams County, Mississippi, and the county seat thereof) is situated in the extreme west portion of said county and bounded on the west by the Mississippi River; and

WHEREAS, a large majority of the qualified electors of said county reside within the corporate limits of the said City of Natchez; and

WHEREAS, due to the geographical location of the said City of Natchez, it is extremely difficult and highly impractical to divide the county into five Supervisor's districts with due regard to equality of population and convenience of situation for election of the members of the Board of Supervisors; and

WHEREAS, the Board of Supervisors is aware of the "one man-one vote" decisions of the courts and is desirous of taking action to the end that the vote of each qualified elector shall have the same weight and effect in the election of all members of the Board of Supervisors:

NOW, THEREFORE, BE IT ORDERED by the Board of Supervisors of Adams County, Mississippi, in regular meeting assembled, as follows:

(1) That all of the qualified electors of Adams County, Mississippi, shall be eligible to vote for each member of the Board of Supervisors of Adams County, Mississippi.

(2) That each candidate shall be a resident of the district which he proposes to represent.

(3) That the Chancery Clerk publish this order in The Natchez Democrat, a newspaper having a general cir-

culation in Adams County, Mississippi, at least twelve (12) months prior to the next general election wherein said Supervisors are elected, the final publication to be on November 5, 1966.

(4) That if twenty per cent (20%) of the qualified electors of the county shall present the Board of Supervisors with a petition objecting to such alternate method within sixty (60) days after the adoption and final publication of any such alternative method, then the Board of Supervisors will call an election after publishing notice thereof in a newspaper published in the county once a week for at least three (3) weeks prior to such election and the question on the ballot shall be whether the entire electorate of the county shall be required to vote for the members of the Board of Supervisors at large, or whether the qualified electors in the said districts shall vote for the candidate in that district. If the majority of those voting vote that all the qualified electors shall be eligible to vote for candidates in each district, then thereafter all elections for members of the Boards of Supervisors shall so be held. If not, members of the Boards of Supervisors shall continue to be elected by the electorate of their respective districts.

ADOPTED AND ORDERED this 19th day of October, 1966.